Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-901

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class,

Petitioner,

-vs-

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK R. DOYLE
R. PAUL SORENSON
KERMITT L. WATERS
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class,	)
Petitioner,	)
vs.	)
RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK,	)
Respondents.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

Petitioner, John Doe, through his counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada in the case RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK, Appellants, vs. JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class, Respondent.

OPINIONS BELOW

The Trial Court entered summary judgment rendering an opinion, findings of fact, conclusions of law and judgment, attached as Appendix F. The Opinion of the Nevada Supreme Court is not reported and is attached as Appendix B.

JURISDICTION

The Supreme Court of the State of Nevada reversed the judgment of the Trial Court on September 30, 1976. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), 62 Stat. 929.

QUESTIONS PRESENTED

1. Can the State, without a compelling interest, condition the use of its Courts upon the use of a party's true name when it carries a substantial likelihood of self incrimination?

2. Does this record, where reasonable discovery has been furnished, present such a compelling State interest for requiring a party's true name?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Nevada Revised Statutes are set forth in Appendix A: N.R.S. 463.01275; 463.160; 30.030.

The following Nevada procedural rules are set forth in Appendix A: NRCP 10(a); 57.

The following constitutional provisions are set forth in Appendix A: United States Constitution, Amendments V and XIV.

STATEMENT OF THE CASE

Petitioner on December 12, 1975, employing the fictitious name of John Doe because of potential self incrimination, in behalf of himself and persons similarly situated, commenced an action in the State of Nevada District Court for declaratory and injunctive relief preventing the enforcement of the Nevada licensing requirements as to certain sports betting activities as set out in the complaint. Appendix C. Sports betting had not been regulated prior to a statutory change enacted in July of 1975. The question presented was whether or not the regulation included purely private gambling and involved construction of the regulation considered in connection with a challenge as being vague and indefinite.

The Trial Court, after allowing discovery to its satisfaction, granted summary judgment in behalf of petitioner issuing an opinion, findings of fact and conclusions of law. Appendix F. The Trial Court particularly ruled that, since the complaint and discovery required petitioner to make incriminating disclosures should the regulation prove

applicable, petitioner had a right to use the psuedonym of John Doe. Appendix F at p. 35.

On appeal the Nevada Supreme Court, while considering a motion for stay, reversed and remanded the same for dismissal because the action had been brought under a fictitious name, stating: "It is not the court's business to render advisory opinions for unknown persons who may or may not have a justiciable controversy with named defendants." (emphasis supplied). Appendix B at p. 14. The Trial Court's findings that John Doe was a real person and that he was in jeopardy of self incrimination were not challenged.

HOW FEDERAL QUESTION WAS PRESENTED.

Petitioner raised the federal question in the Court of first instance, the District Court for Clark County, Nevada by including as paragraph II of the complaint, the following:

"That the true identity of Plaintiff, JOHN DOE, is not set forth for the reasons that such disclosure would jeopardize Plaintiff's constitutional rights against self-incrimination under the Fifth and Fourth* Amendments of the United States Constitution and as such is stated or alleged herein as a pseudonym named JOHN DOE."

Appendix C at p. 17.

---

*Erratum on original complaint - reads: "Fourth" and should read: Fourteenth.

This was duly controverted by a motion to dismiss contesting petitioner's standing to bring action as John Doe. Summary Judgment was granted in favor of petitioner by order on July 20, 1976, Appendix F. On appeal, the Supreme Court of Nevada reversed with an unpublished opinion filed September 30, 1976, Appendix B. The petitioner is requesting review of the decision of the Nevada Supreme Court.

REASON FOR GRANTING WRIT

I.

THE STATE IS REQUIRING, WITHOUT A COMPELLING INTEREST, AS A CONDITION TO THE USE OF ITS COURTS, THAT PETITIONER USE HIS TRUE NAME IN JEOPARDY OF HIS RIGHT TO REFRAIN FROM SELF INCRIMINATION IS A VIOLATION OF CONSTITUTIONAL RIGHT AND A QUESTION OF NATIONAL IMPORTANCE.

This case considers the important question of whether or not the States can, without a compelling interest, condition the use of its Courts upon the surrender of the Fifth Amendment right to refrain from self incrimination. This is of national importance.

The Nevada Supreme Court decided that because plaintiff used a psuedonym that there was no justiciable controversy. However, the trial court had found that petioner was a real person, that the proceedings jeopardized his right to refrain from self incrimination and that sufficient discovery had been provided by petitioner. This should satisfy any reasonable interest of the State of Nevada.

II.

BOTH THE RIGHT TO EQUAL ACCESS TO THE COURTS AND THE RIGHT TO REFRAIN FROM SELF INCRIMINATION ARE FUNDAMENTAL RIGHTS SUCH THAT ENJOYMENT OF ONE SHOULD NOT BE

SACRIFICED TO THE OTHER IF POSSIBLE AND THEN ONLY IF THERE IS A COMPELLING STATE INTEREST.

The right to use the Courts has been recognized as one enjoyed by all citizens. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780,28 L.Ed.2d.113(1969). It is also clear that the right to refrain from self incrimination is fundamental. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489,12 L.Ed.2d. 653 (1964); Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d.889 (1968); Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); Haynes v. United States,390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968). The question of infringement of the privilege against compulsory self incrimination must be resolved by balancing public need against individual claim to constitutional protection. California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d. 9 (1971). For this reason, the State cannot condition use of the Courts upon surrender of the right to self incrimination without a compelling interest. Further, since both the right of equal access to the Courts and the right to refrain from self incrimination are fundamental rights, the sacrifice of one in favor of the other should not be forced if it can be avoided. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d. 1247 (1968).

III.

THE RECORD SHOWS NO COMPELLING REASON TO REQUIRE PETITIONER TO SACRIFICE HIS RIGHT TO REFRAIN FROM SELF INCRIMINATION BY USING HIS TRUE NAME.

Petitioner used the pseudonym because the requirement of the production of evidence

necessary for orderly adjudication required the furnishing of potentially incriminating information. The state can require the production of necessary evidence. Boddie v. Connecticut, supra. The failure to provide discovery can result in a dismissal. See Annot. 4 ALR 3d 545 (1965). Here petitioner provided facts and discovery to the trial court's satisfaction, (Appendix F at p. 35 .) and this was not challenged by the Nevada Supreme Court.

That providing the necessary information and discovery put petitioner in jeopardy of incriminating himself cannot be questioned. It was so found by the Trial Court and this has not been challenged. Since the concealment of his true identity is the only alternative to self incrimination, the only other legitimate state interest to be served is that petitioner is a real person. The Trial Court so found and this is also unchallenged. This was certified to by an officer of the Court. There is no other compelling reason for requiring petitioner's true name.

CONCLUSION

For these reasons, a Writ of Ceriorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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Las Vegas, Nevada 89101
Counsel for Petitioner

APPENDIX A

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

NEVADA REVISED STATUTES

N.R.S. 463.01275

"Sports pool" defined. "Sports pool" means the business of accepting wagers on sporting events by any system or method of wagering other than the system knows as the pari-mutual method of wagering.
(added to NRS by 1975, 673)

N.R.S. 463.160

1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool; or

(b) To provide or maintain any information service the primary purpose of which is to aid the placing or making of wagers on events of any kind; or

(c) To receive, directly or indirectly, any compensation or reward for any percentage or share of the money or property played, for keeping, running or carrying on any game, slot

machine, horserace book or sports pool, without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town. ****

N.R.S. 30.030

Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

NEVADA RULES OF CIVIL PROCEDURE

Rule 10(a)

Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. A party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly.

Rule 57 DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to statute, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advace it on the calendar.

UNITED STATES CONSTITUTION

FIFTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEVADA
Filed September 30, 1976
No. 8956

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK,

Appellants,

vs.

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class,

Respondent.

Appeal from judgment granting declaratory and injunctive relief; Eighth Judicial District Court, Clark County; James Brennan, Judge.

Reversed and remanded with direction to dismiss action.

Robert List, Attorney General, and Marcus H. Sloan, Deputy Attorney General,
for Appellant State of Nevada.

George E. Holt, District Attorney, Thomas J. Moore and A. J. Hicks, Deputy District Attorneys, Clark County,
for Appellants Ralph Lamb and County of Clark.

R. Paul Sorenson and
Kermitt L. Waters of
Las Vegas,
for Respondent.

O P I N I O N

Per Curiam:

This action for declaratory and injunctive relief was commenced by John Doe, identity unknown, for himself and as the purported representative of an undefined class of persons similarly situated. Its purpose is to preclude the enforcement against the unidentified plaintiffs of certain criminal laws regarding bookmaking. The district court granted plaintiffs the relief requested, and this appeal followed.

The immediate matter before us for attention is the motion of the appellants for a stay of the district court judgment pending appeal. Since we believe it to be clear that the district court was in error in entering judgment for plaintiffs, we choose to dispose of this litigation rather than to rule upon the interim motion for a stay order. Accordingly, we dismiss this appeal and remand the matter back to the district court with direction to dismiss the action below. It is not the court's business to render advisory opinions for unknown persons who may or may not have a justiciable controversy with named defendants.

/s/ Gunderson, C.J.
Gunderson

/s/ Batjer, J.
Batjer

/s/ Zenoff, J.
Zenoff

/s/ Mowbray, J.
Mowbray

/s/ Thompson, J.
Thompson

APPENDIX C

IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed May 5, 1976
Case No. 32911

JOHN DOE, and every other person similarly situated in the same or similar class,

Plaintiffs,

vs.

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and CLARK COUNTY,

Defendants.

AMENDED ACTION IN NATURE OF A QUASI-CRIMINAL COMPLAINT FOR N.R.S. 30.010 ET SEQ. DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AGAINST ENFORCEMENT OF CERTAIN CRIMINAL AND CIVIL STATUTES AND ORDINANCES

COMES NOW, JOHN DOE, and complains of the Defendant, RALPH LAMB, acting within his official capacity and for cause of action alleges as follows:

COUNT I

I

Plaintiffs are citizens of Nevada and residents of Clark County.

II

That the true identity of Plaintiff, JOHN DOE, is not set forth for the reasons that such disclosure would jeopardize Plaintiff's constitutional rights against self-incrimination under the Fifth and Fourth Amendments of the United States Constitution and as such is stated or alleged herein as a pseudonym named JOHN DOE.

III

That Defendant, RALPH LAMB, is the Sheriff of Clark County and is the chief law enforcement officer of the State of Nevada and the County of Clark and is currently enforcing or threatening to enforce all statutes and ordinances complained of herein against Plaintiffs, both criminally and civilly.

IV

That Plaintiff, JOHN DOE, is and intends to immediately engage in substantial private wagering, to wit:

1. Upon existing pre-arranged terms and conditions between close personal friends of the Plaintiff, which are arrived at and arranged within the State of Nevada, Plaintiff and said close personal friends intend to routinely and frequently bet or wager on various non-Nevada sporting events in their private homes or dwellings.

2. That Plaintiff, under the circumstances described above, does not now nor will he under the intended proposed arrangement above described hold himself out as a gambler to the public and does not now nor does he intend to advertise or maintain any business for such purposes.

V

In this action Plaintiff requests that the records and files in this matter be ordered non-public and sealed by this Court and all hearings be in camera proceedings pursuant to N.R.C.P. Rule 77(b) in order to protect Plaintiff's self-incrimination rights.

VI

That in the spring of 1975 the 1975 Nevada Legislature enacted Senate Bill No. 47 which is an amendment to N.R.S. 463.145, which became effective July 1, 1975, which provides for the first time in relevant part as follows:

> "'Sports pool' means the business of accepting wagers on sporting events by any known system or method of wagering other than the system known as the pari-mutual method of wagering." (emphasis added)

VII

Further, such conduct of the Plaintiff described in Paragraph IV above does not fall within the provisions of N.R.S. 463.0110, which provides as follows:

> "'Game' or 'gambling game' means any banking or percentage game played with cards, dice or any mechanical device or machine for money, property, checks, credit or any representative of value, including without limiting, the generality of the foregoing faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven and a half, big injun, klondike, crpas, stud poker, draw poker or slot machine, but shall not include social games played solely for drinks or cigars or cigarettes

> served individually, games played in private homes or residences for prizes or games operated by charitable or educational organization which are approved by the board pursuant to the provisions of N.R.S. 463.490." (Emphasis added)

VIII

Said Senate Bill 47 incorporates for the first time the "business" of sports pool and requires such to be licensed by the Defendants. Plaintiff alleges that said statute is unconstitutionally broad and vague and unenforceable in violation of the due process clause of the Fourteenth Amendment and if said statute is enforced against Plaintiff, Plaintiff will be subjected to criminal or civil offenses under Nevada law and will suffer irreparable harm and injury.

IX

That Plaintiff, JOHN DOE, seeks a declaratory judgment declaring Senate Bill 47 to be unconstitutionally vague pursuant to N.R.S. 30.010 et seq and injunctive relief against the Defendant who is threatening to enforce its newly enacted Senate Bill 47 amending N.R.S. 463.145 sub sect. 4, which came into effect July 1, 1975, against Plaintiff's proposed conduct.

X

Plaintiff alleges that if said Defendant is not enjoined from enforcing Senate Bill 47 as set forth in N.R.S. 463.145 as amended July 1, 1975, Plaintiff will suffer irreparable harm and injury and Plaintiff has no plain, adequate or speedy remedy at law.

COUNT II

Plaintiff alleges and re-alleges that all allegations contained in the first Count as set forth from Paragraphs I to X and re-alleges said facts as if they were fully set forth here and in addition alleges as follows:

XI

That said N.R.S. 463.145 as amended by Senate Bill 47 of the 1975 Legislature was intended to regulate only commercial or public gambling and as such is inapplicable and was not intended to cover Plaintiff's above described private betting. Plaintiff seeks from this Court a declaratory judgment that the N.R.S. 463.145 as amended by Senate Bill 47 does not apply to Plaintiff's private betting conduct as described above in Paragraph IV.

XII

Plaintiff seeks an injunction thereof, a temporary restraining Order and a preliminary and permanent injunction against the Defendant from enforcing N.R.S. 463.145 as amended by Senate Bill 47 against Plaintiff either civilly or criminally. If such injunction is not granted Plaintiff will suffer irreparable harm and injury and Plaintiff has no plain, adequate or speedy remedy at law.

COUNT III

Plaintiff alleges and re-alleges all allegations contained in the first and second Counts as if fully set forth here and Plaintiff further alleges as follows:

XIII

That 8.04.140 of the Clark County Ordinance provides as follows:

"License required for all public gaming"

"It shall be unlawful for any person other than an owner or operator of the business establishment or one licensed as a slot machine or coin operated gaming devices operator to place, install, lease, let or rent under any arrangement whatsoever any slot machine or any coin operated gaming device in any location within the county outside the incorporated cities and towns both within and without the unincorporated cities and towns so that same is subject to play by the public." (emphasis added)

XIV

That said Ordinance was not intended to cover said private wagering as described above in Paragraph IV and therefor Plaintiff seeks a declaratory judgment declaring the such conduct is not covered by said Ordinance.

XV

Plaintiff prays for a temporary injunction; a preliminary injunction; and permanent injunction against Defendant from enforcing said Ordinance against Plaintiff for said private wagering.

XVI

Plaintiff has no plain, adequate or speedy remedy at law and Plaintiff will suffer irreparable harm and injury if injunctive relief is not granted as prayed for herein.

WHEREFORE, Plaintiff in the above styled matter prays that this Court enter judgment and relief as set forth below:

COUNT I

For declaratory judgment declaring Chapter N.R.S. 463 as amended by Senate Bill 47, more particularly described in Count I above, is vague, indefinite and therefore, unconstitutional and in violation of the due process clause of the United States Constitution; and for a preliminary and permanent injunction against Defendant from enforcing said statute against Plaintiff for his proposed private conduct as set forth in Paragraph IV above.

COUNT II

For declaratory judgment declaring that N.R.S. 463 as amended by Senate Bill 47 was not intended to cover Plaintiff's private gaming as set forth in Paragraph IV of this Complaint and for preliminary injunction and permanent injunction against Defendant from enforcing said statute against Plaintiff for actions described in Paragraph IV above.

COUNT III

For declaratory judgment declaring that Section 8.04.140 of the Clark County Ordinance was not intended to cover private wagering as described above in Paragraph IV of this Complaint and preliminary and permanent injunction against Defendant from enforcing said county ordinance.

N.R.C.P. RULE 23(b)(2) CLASS ACTION ON BEHALF OF ALL PERSONS SIMILARLY SITUATED.

XVII

PURSUANT TO N.R.C.P. RULE 23, Plaintiffs also reallege and reincorporate all allegations set forth above in Paragraphs I through XVI, including the prayers of Counts I through III, on behalf of all persons similarly situated.

XVIII

The number of persons who constituted the class are so numerous as to make it impracticable to bring them all before the Court. The right, which is the subject matter of this action is common to all Class Plaintiffs, and there are controlling common questions of law or fact involved in the prosecution of this action. The claim of these Plaintiffs are typical and fairly representative of the claims of all Class Plaintiffs, and the Plaintiffs will fairly and adequately protect the interests of such class; and, there are common questions of law and fact common

to the members of the class which predominate over any question affecting only individual members, and a class action is superior to other available methods for a fair and efficient adjudication of this controversy; and, the prosecution of separate actions by or against individual member of the class would create a risk of inconsistent adjudications with respect to the individual members, which would establish incompatible standards of conduct for the party opposing the class ; or adjudications with respect to individual members of the class which would, as a practicable matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

WHEREFORE, Plaintiff prays that this Court will immediately order this case certified as a N.R.C.P. Rule 23(b)(2) class action.

DATED this 5 day of May, 1976.

/s/ Kermitt L. Waters
KERMITT L. WATERS
R. PAUL SORENSON
323 Las Vegas Boulevard South
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

V E R I F I C A T I O N

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

KERMITT L. WATERS, being first duly sworn, deposes and says:

1. Affiant has read all of the allegations contained in the above and foregoing Amended Complaint.

2. Affiant believes that all of the allegations contained in the above and foregoing Amended Complaint are true and correct to the best of his information and belief.

/s/ Kermitt L. Waters
KERMITT L. WATERS

Subscribed and sworn to before me this 5 day of May, 1976.

/s/ Susan A. Ortiz
NOTARY PUBLIC in and for said County and State

APPENDIX D

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed May 17, 1976

JOHN DOE,)
)
Plaintiff,)
)
vs.)
)
RALPH LAMB, SHERIFF OF CLARK)
COUNTY, NEVADA, in his official)
capacity, STATE OF NEVADA, and)
COUNTY OF CLARK,)
)
Defendants.)

A N S W E R

COMES NOW Defendants, COUNTY OF CLARK and RALPH LAMB, Sheriff of the County of Clark, State of Nevada, and answer the complaint on file herein as follows:

I

Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 4, 5, 7, 9, 14, 15, 17 and 18 of the complaint.

II

Defendants admit the allegations contained in paragraph 13 of the complaint.

III

Defendants admit that part of paragraph 3 of the complaint that alleges that Defendant, RALPH LAMB, is the Sheriff of the County of Clark but deny all other allegations.

IV

Defendants admit that part of paragraph 6 of the complaint that alleges that Senate Bill 47 amended Chapter 463 of the Nevada Revised Statutes to include the following language:

> "Sports pool" defined. 'Sports pool' means the business of accepting wagers on sporting events by any system or method of wagering other than the system known as the pari-mutual method of wagering."

but deny all other allegations.

V

Defendants deny the allegations contained in paragraphs 8, 10, 11, 12 and 16 of the complaint.

AFFIRMATIVE DEFENSES

I

The Court lacks jurisdiction because the Court is without authority to render advisory opinions.

II

The Court lacks jurisdiction because the

Plaintiff, JOHN DOE, is proceeding in the name of a fictitious person and under the facts alleged is without standing or capacity to bring this action.

III

The Court lacks jurisdiction because the Plaintiff class fails to qualify as a class under NRCP 23(a) and is undefined, unascertainable, unnoticed, overbroad and vague.

IV

The Court has exceeded its jurisdiction and denied the Defendants due process and equal protection of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States in that the initiation of an action operates as a waiver of Fifth Amendment privileges against self-incrimination by the Plaintiff in a civil proceeding or requires the dismissal of said action should discovery be refused.

V

The complaint fails to state a claim against the Defendants upon which relief can be granted.

WHEREFORE, Defendants pray that Plaintiffs take nothing by their complaint

and that they be hence dismissed with their costs.

GEORGE E. HOLT
DISTRICT ATTORNEY

By Thomas J. Moore
THOMAS J. MOORE
Deputy District Attorney
Clark County Courthouse
Las Vegas, Nevada 89101
Attorney for Defendants

RECEIPT OF COPY of the above and foregoing ANSWER is hereby acknowledged this 17th day of May, 1976.

ROBERT LIST
ATTORNEY GENERAL

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APPENDIX E

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed May 18, 1976

JOHN DOE,)
)
Plaintiff,)
)
vs.)
)
RALPH LAMB, SHERIFF OF CLARK)
COUNTY, NEVADA, in his official)
capacity, STATE OF NEVADA, and)
COUNTY OF CLARK,)
)
Defendants.)

ANSWER

COMES NOW the Defendant, State of Nevada, and through its attorney Robert List, Attorney General of the State of Nevada, and for its answer to the Amended Action in the Nature of A Quasi-Criminal Complaint for NRS 30.010 et. seq. Declaratory Judgment and Injunctive Relief Against Enforcement of Certain Criminal and Civil Statutes and Ordinances on file herein admit, deny and allege as follows:

COUNT I

1. Answering paragraphs I, II, IV, V, VII, and IX of Count I of Plaintiff's Complaint, Defendant State of Nevada alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein;

2. Answering paragraph III of Count I of said Complaint, Defendant State of Nevada admits that Defendant Ralph Lamb is the Sheriff of Clark County and denies all other allegations contained therein;

3. Answering paragraph VI of Count I of said Complaint, Defendant State of Nevada denies the allegations contained therein but admits that Senate Bill 47 amended Chapter 463 of the Nevada Revised Statutes to include the following language:

> "Sports pool" defined. "Sports pool" means the business of accepting wagers on sporting events by any system or method of wagering other than the system known as the pari-mutual method of wagering."

4. Answering paragraphs VIII and X of Count I of said Complaint, Defendant State of Nevada denies the allegations contained therein;

COUNT II

1. Answering Count II of said Complaint, Defendant State of Nevada denies all of the allegations contained therein;

COUNT III

1. Answering Count III of said Complaint, Defendant State of Nevada admits the allegations contained in paragraph XIII and denies all of the remaining allegations contained in said Count III.

AFFIRMATIVE DEFENSES

1. The Court lacks jurisdiction because the Court is without authority to render advisory opinions.

2. The Court lacks jurisdiction because the Plaintiff, John Doe, is proceeding in the name of a fictitious person and under the facts as alleged is without standing or capacity to bring this action.

3. The Court lacks jurisdiction because the Plaintiff class fails to qualify as a class under NRCP 23(a) and is undefined, unascertainable, unnoticed, overbroad and vague.

4. The Court has exceeded its jurisdiction and denied the Defendant State of Nevada due process and equal protection of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States in that the initiation of an action operates as a waiver of Fifth Amendment privileges against self-incrimination by the Plaintiff in a civil proceeding or requires the dismissal of said action should discovery be refused.

5. The Complaint fails to state a claim against the Defendant State of Nevada upon which relief can be granted.

WHEREFORE, Defendant State of Nevada prays that Plaintiff take nothing by reason of his Complaint, and that the Defendant State of

Nevada be awarded costs and attorney's fees.

ROBERT LIST, Attorney General

By /s/ Mike Sloan
Mike Sloan,
Deputy Attorney General
Gaming Division

Receipt of copy of the above and foregoing ANSWER is hereby acknowledged this 17th day of May, 1976.

GEORGE HOLT, District Attorney

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R. Paul Sorenson
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APPENDIX F

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed July 20, 1976

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class,

Plaintiffs,

vs.

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capapcity, STATE OF NEVADA, and COUNTY OF CLARK,

Defendants.

OPINION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
JUDGMENT

Plaintiff, on behalf of himself and on behalf of every other person similarly situated in the same or similar class, moved for an N.R.C.P. Rule 56 summary judgment and the matter came on for hearing on this 2nd day of July, 1976. Plaintiff was represented by his attorneys and defendants State of Nevada, County of Clark and Ralph Lamb were all represented by their respective attorneys. This Court, after having considered all the pleadings, files, exhibits, discovery, affidavits and after hearing the arguments of counsel rendered the following opinion,

findings of fact, conclusions of law and judgment:

OPINION

This case, of first impression in Nevada, was filed by Plaintiff on the 12th day of December, 1975, seeking to have this Court declare certain sections of Chapter 463 of N.R.S. and certain sections of the Clark County Ordinance either unconstitutional or inapplicable to Plaintiff's private gaming activity.

Plaintiff additionally sought a preliminary and permanent injunction against the enforcement of said Statutes and Ordinance. Although this Court deems this action to involve primarily issues of law, nevertheless, the Defendants have sought and this Court has granted Defendants several separate continuances in order to accomodate the defendants' plea to complete discovery and to further respond to plaintiff's briefs.

Defendants' entire discovery, however, seems keyed to discovering Plaintiff's true identity rather than to discover any genuine issue of material fact. Accordingly, this Court has refused Defendants' request for further delay of this hearing.

This Court has heretofore ruled that Plaintiff is a real person who is entitled to bring this action under the pseudonym of John Doe in order to protect his Fifth Amendment Rights against self-incrimination. Self-incrimination is a fundamental Federal constitutional right which no person should be unnecessarily compelled to forfeit in order to seek protection

through civil litigation.

The Plaintiff, through his attorneys, has sworn under oath that the Plaintiff is a real person; there is no sworn dispute to this issue and this Court accepts such fact as true.

Likewise, by its order of April 27, 1976, this Court has heretofore certified this action as an N.R.C.P. Rule 23(b)(2) class action and has ordered prior notice waived as to all persons similarly situated. Hayes v. Seaboard Coastline R.R., 46 FRD 41; Johanson v. City of Baton Rouge, 50 FRD 295.

The history of Nevada's legal public gaming statutes began in 1869 with licenses payable to the county sheriff. The gaming laws of Nevada went through many minor changes after 1869 on several occasions with a period when gambling was illegal. It was in 1933 that a defeated initiative petition, which had a specific provision to outlaw private gambling, first made it clear that private gambling was not intended for regulation and is not prohibited by Nevada law. See report of Committee on Public Morals on Initiative Petition No. 1, dated February 20, 1933, which provides in part:

> "It prohibits even social games in the home, such as bridge, five hundred or whist, when a prize or any representative of value is a feature. In this particular section 6 reads: 'This act shall not be construed to prohibit social games when

> not played, either directly or indirectly, for money, property, checks, credit, or other representative of value.' Social games in violation of section 6 would also be inviolation of section 3 which prohibits the possession of any cards, tables,**** or gambling devices of any nature. Social games in the home in violation of section 4 provides for the seizure by search warrant of such cards, tables or gambling devices. In such cases section 5 would make a violation of the act a gross misdemeanor, punishable, upon conviction, by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the courty jail not less than sixty days nor more than a year, or by both such fine and imprisonment. Upon a second conviction, that it becomes mandatory on the court to impose the prison sentence, either with or without the fine.
>
> "Under sections 3, 4, 5 & 6 social games in the home played for a prize, or other representative of value, or a home game of poker, would subject the players to arrest upon complaint of any neighbor fanatic who wants to prohibit gambling."

In 1975 Senate Bill 47 amended N.R.S. 463.01275 effective July 1, 1975 to provide:

> "'Sports pool' means the business of accepting wagers on sporting events by any known system or method of wagering other thant the system known as the pari-mutual method of wagering." (emphasis added)

Further, N.R.S. 463.0110, provides as follows:

> "'Game' or 'gambling game' means any banking or percentage game played with cards, dice or any mechanical device or machine for money, property, checks, credit or any representative of value, including without limiting, the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven and a half, big injun, klondike, craps, stud poker, draw poker or slot machine, but shall not include social games played solely for drinks or cigars or cigarettes served individually, games played in private homes or residences for prizes or games operated by charitable or educational organizations which are approved by the board pursuant to the provisions of N.R.S. 463.490." (emphasis added)

Said Senate Bill 47 incorporates for the first time the "business" of sports pool and requires such to be licensed.

Sec. 8.04.140 of the Clark County Ordinance provides as follows:

"License required for all public gaming."

> "It shall be unlawful for any person other than an owner or operator of the business establishment or one licensed as a slot machine or coin operated gaming devices operator to place, install, lease, let or rent under any arrangement whatsoever any slot machine or any coin operated gaming device in any location within the county outside the incorporated cities and towns both within and without the unincorporated cities and towns so that same is subject to play by the public." (emphasis added)

Historically, at common law, the King allowed noblemen to gamble, but gambling by the poor was forbidden. Nevada has adopted the common law of England and, except as expressly altered by statute, private gambling or social gambling is permitted at common law. Since class distinctions are abolished, we are now all noblemen in the eyes of the law.

Looking to the other sister states we find that private or social gambling has been determined to be legal in Alabama. City of Birmingham v. Willie Richard, 203 So.2d 695 (Sup.Ct.Ala., November, 1976.)

The legislature of the State of Hawaii has legalized private or social gambling.

Hawaii defines in the Hawaii Code section 1220(8) a player and social gambling as:

> "'Player' means a person over the age of majority who engages in social gambling solely as a contestant or bettor on equal terms with the other participants therein without receiving or becoming entitled to receive something of value or any profit therefrom other than his personal gambling winnings. 'Social gambling' is gambling, or a contest of chance, in which the only participants are players and from which no person, corporation, or other business entity receives

or becomes entitled to receive something of value or any profit whatsoever, directly or indirectly, other than as a player, from any source, fee, remuneration connected with said gambling, or such activity as arrangement or facilitation of the game, or permitting the use of premises, or selling or supplying for profit refreshments, food, drink service, or entertainment to participants, players, or spectators. A person who engages in 'book-making' as defined in paragraph (2) is not a 'player'."

This Court has reviewed the legislative history of Nevada gaming laws from 1863 to the present, the legislative committee reports, the reports of the Attorney General (1440 B-26), the rules and regulations of the Nevada Gaming Commission and Control Board, the case law of sister states and the Common Law of England, as well as other research material too numerous to mention.

Plaintiffs seek declaratory relief protection against criminal statutes. It is well settled that such declaratory relief is available when appropriate against criminal statutes, 10 A.L.R. 3d 727.

Turning to the construction at hand, this Court notes, throughout recent Nevada Statutes and the Clark County Ordinances, specific exceptions (although somewhat vague) which include an exemption for private gaming. The Rules and Regulations of the State Gaming Control Board are silent as to private gaming. Private or social gaming is a common past time for Nevada residents.

If construed broadly to include private gambling, the statute presents grave questions of constitutionality including due process objections of being overbroad, vague and indefinite as pointed out by Plaintiff. Strict construction is a recognized method to avoid these problems and remand for construction has been an approach to these problems taken by the United States Supreme Court. Plummer v. City of Columbus, Ohio, 414 U.S. 2, 945 S.Ct. 17, 38 L.Ed.2d 3 (1973); Lewis v. City of New Orleans, 415 U.S. 130, 945 S.Ct. 970, 39 L.Ed.2d 214 (1974); Gooding v. Wilson 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). It is also a recognized maxim of criminal law that statutes must be strictly construed and that anything not expressly included is excluded. Private gambling is not expressly included.

It is apparent that the Clark County Ordinance was not intended to cover such private wagering.

It is also apparent to this Court that N.R.S. 463.145, as amended by Senate Bill 47 of the 1975 Legislature, was intended to regulate only public gambling and as such is not intended to cover Plaintiffs' private betting or gambling.

ACCORDINGLY, THIS COURT FINDS AND CONCLUDES AS FOLLOWS:

FINDINGS OF FACT

I

Plaintiff is a real person over the age of 21 and entitled to bring this action as a

pseudonym by the name of JOHN DOE.

2

Plaintiff is, and has been, engaged in private gambling within the State of Nevada in the following respects:

A

That Plaintiff, JOHN DOE, is engaged and intends to immediately engage in substantial private wagering.

B

That upon pre-arranged terms and conditions between friends, Plaintiff frequently makes bets with such persons in large and small amounts of money upon sporting events.

C

Upon existing pre-arranged terms and conditions between friends of the Plaintiff, which are arrived at and arranged with the STate of Nevada, Plaintiff and said friends intend to routinely and frequently bet or wager on various sporting events.

D

That such private gambling is not known to the public, is not advertised or published, is not held out to the public in any way, nor is the public in any way invited and it is always negotiated and conducted in private.

E

That Plaintiff, under the circumstances described above, does not hold himself out as a gambler to the public and does not advertise or maintain any business for such purposes.

3

That the Defendants have indicated an intent to criminally prosecute Plaintiff for such conduct, and the threat thereof exists causing him irreparable harm and injury such that Plaintiff would have no adequate or speedy remedy at law.

THEREFORE, based on the above findings, it is the conclusions of the Court that:

1. N.R.S. 463.160 and N.R.S. 463.01275 are constitutional as construed in the above opinion.

2. The Plaintiffs are entitled to a declaratory judgment declaring that the betting activity described in the findings does not constitute a "sports pool" as defined in N.R.S. 463.01275 and therefore the licensing requirements of N.R.S. 463.160 are inapplicable to the plaintiff and all persons similarly situated. There is no Nevada Statute or Clark County Ordinance which prohibits the described gambling activity.

3. The plaintiffs are entitled to a permanent injunction preventing any state officials from prosecuting or harassing them for the above-stated conduct, or for failure to have a license under N.R.S. 463.160.

4. Plaintiff, JOHN DOE, is granted leave to apply and have his true name inserted as plaintiff when or if this judgment becomes final.

5. All members of the class shall also have leave to apply for the addition of their true names as plaintiffs when the judgment becomes final.

6. That the findings, conclusions and judgment be published in a newspaper of general publication in Clark County once each week for three weeks at plaintiff's cost so that members of the plaintiff class have notice of this decision.

JUDGMENT

Upon the findings of fact and conclusions of law stated above, it is the order and judgment of this Court:

1. That the betting activities of Plaintiff, JOHN DOE, and all other persons similarly situated, as set forth in the findings, are not contrary to Nevada law and are not required to be licensed under N.R.S. 43.160.

2. That the Defendants are permanently enjoined from the prosecution or harrassment of the Plaintiff or any of the members of the certified class for any betting activity as described in the findings for for failure to be licensed under N.R.S 463.160.

3. That JOHN DOE, and any members of the certified class have leave to apply and receive, upon satisfactory showing that they are similiarly situated, the inclusion of their true names in the judgment when the same becomes final.

4. That the findings of fact, conclusions of law and judgment shall be published in a newspaper of general circulation in Clark County, once each week for three weeks beginning July 26, 1976, at Plaintiff's cost.

DATED this 20 day of July, 1976.

BY THE COURT

/s/ James Brennan

Prepared by:

/s/ R. Paul Sorenson
/s/ Kermitt L. Waters
R. PAUL SORENSON
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Petition for A writ of certiorari was served on the following by mailing a copy thereof, first class mail, postage prepaid to:

George E. Holt, District Attorney
Thomas J. Moore, Deputy District Attorney
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Robert List, Attorney General
Mike Sloan, Deputy Attorney General
Gaming Division
300 South Fourth St., #501
Las Vegas, Nevada 89101

on the 28th day of December, 1976.

/s/ Sarah S. Higgins
Sarah S. Higgins

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-901

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class, *Petitioner,*

vs.

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK, *Respondents.*

Supreme Court, U. S.
FILED
JAN 27 1977
MICHAEL RODAK, JR., CLERK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENTS OPPOSING CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-901

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class, *Petitioner*,

vs.

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENTS OPPOSING CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is reported at 92 Nev. Adv. Op. 163, 554 P.2d 732 (1976).

JURISDICTION

The jurisdiction of this Court is questioned under Article III, §2 of the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Where the Supreme Court of the State of Nevada has reversed and remanded an action with direction to the trial court to dismiss on the grounds that said action was in the nature of an advisory opinion, and where the issuance of advisory opinions are in excess of the jurisdiction granted to the courts of the State of Nevada by the Constitution of the State of Nevada, does the United States Supreme Court have jurisdiction to entertain a review of said decision by certiorari?
2. Where the Supreme Court of the State of Nevada has decided an action on state jurisdictional grounds without reaching or reviewing the purported federal question presented by an application for certiorari, does the United States Supreme Court have jurisdiction to review said purported federal question?
3. Does the United States Supreme Court have jurisdiction to entertain a review of the federal question presented by this application?
4. Assuming that the United States Supreme Court has jurisdiction to entertain this application, is the cause presented of sufficient national application and import to warrant the Court's affirmative consideration of this application?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Nevada Constitution, Art. 6, §§4 and 6 (App. A2-A3).

United States Constitution, Art. III, §2 (App. A1).

Uniform Declaratory Judgment Act, Nevada Revised Statute 30.030 (P.B. 10).

Nevada Rule of Civil Procedure 10(a) (App. A3-A4).

Nevada Rule of Civil Procedure 23(a) (App. A4-A5).

STATEMENT OF CASE

On December 12, 1975, an action was brought against the Sheriff of Clark County by an unidentified plaintiff under the pseudonym John Doe. That action sought a declaratory judgment and injunction against the enforcement of the gaming statutes of the State of Nevada and ordinances of the County of Clark.

A Motion to Dismiss was filed on January 15, 1976, by the Sheriff contesting the jurisdiction of the District Court to proceed with this action. It was contended that John Doe failed to satisfy the requirements for declaratory relief since there was no justiciable controversy and in effect sought to secure an advisory opinion.

After filing this Motion to Dismiss the Sheriff noticed John Doe that he would take his oral deposition. Thereafter the County of Clark and the State of Nevada were made party defendants by order of the District Court and also moved to dismiss the complaint. Doe, invoking the Fifth Amendment privilege moved for a protective order to prevent the taking of his deposition. In addition he sought to amend the complaint to include a class of

similarly situated persons and to accelerate the trial on its merits. On April 23, 1976, the District Court denied the Respondents' motions to dismiss the complaint; granted Petitioner's motions and ordered all discovery to be completed by May 17, 1976. The amended complaint was filed on May 5, 1976 (Petitioner's Brief page 16 hereinafter referred to as P.B.).

Written interrogatories and requests to produce documents were directed to the Petitioner as an individual and as the only representative of the undefined and unnoticed class. These interrogatories were answered on information and belief by counsel for the Petitioner on May 17, 1976. Petitioner's objection to the request for production was founded upon Fifth Amendment privilege.

The answers to the complaint filed on May 17, 1976 denied every material allegation contained in the amended complaint (P.B. 26-33).

Subsequently, Petitioner Doe's Motion for Summary Judgment was granted by the District Court on July 20, 1976, declaring that the contested laws were not unconstitutional yet enjoining the Respondents from enforcing those laws against the Petitioner Doe and the purported class (P.B. 34-45). The District Court refused to stay its decision pending appeal.

The Respondents filed a joint appeal on July 21, 1976 and a Motion for a Stay Pending Appeal on July 27, 1976. Opposition Points and Authorities were filed on July 30, 1976 and the motion was argued on August 3, 1976. On September 30, 1976, the Supreme Court of the State of Nevada reversed the decision of the District Court and remanded with direction to dismiss.

On December 28, 1976, the Petitioner served the Respondents herein by mailing a copy of his Petition for

a Writ of Certiorari and Respondents received said Petition on the 30th day of December, 1976. This proceeding has ensued (P.B. 46).

ARGUMENT

These Respondents respectfully submit that the United States Supreme Court is without jurisdiction to consider this petition on behalf of JOHN DOE and the purported class and should deny the same for the following reasons:

I

The Judgment of the Nevada Supreme Court Rests Upon Adequate Non-Federal Grounds

The decision of the Nevada Court in the instant case is both short and clear. Respondents see no ambiguity in the holding of this opinion.

> "The immediate matter before us for attention is the motion of the appellants for a stay of the district court judgment pending appeal. Since we believe it to be clear that the district court was in error in entering judgment for plaintiffs, we choose to dispose of this litigation rather than to rule upon the interim motion for a stay order. Accordingly, we dismiss this appeal and remand the matter back to the district court with direction to dismiss the action below. *It is not the court's business to render advisory opinions. . .*" (Emphasis added). *Lamb* v. *Doe*, 92 Adv. Op. 163, 554 P.2d 732, 733 (1976).

This Court's attention is directed to the Constitution of the State of Nevada, Art. 6, §§4 and 6 (App. A2-A3) and to the decision of the Supreme Court of Nevada in

City of North Las Vegas v. *Cluff*, 85 Nev. 200, 442 P.2d 461 (1969) wherein the Supreme Court of Nevada stated:

> "We do not have constitutional permission to render advisory opinions." At 201.

The Supreme Court of Nevada held that it was without jurisdiction to entertain Petitioner's action and that the trial court similarly lacked jurisdiction to render advisory opinions. Lack of jurisdiction has been held to be an adequate state ground. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Copperweld Steel Co.* v. *Industrial Commission*, 324 U.S. 780 (1945).

The rule that this court will decline to review state court judgments which rest on independent and adequate state grounds is also necessary to avoid advisory opinions, since the jurisdiction of the Supreme Court of the United States is similarly limited. *Henry* v. *State of Mississippi*, 379 U.S. 443 (1965). Advisory opinions are not cases or controversies under Art. III, §2 of the United States Constitution (App. A1).

The implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions. The rule implements the separation of powers and also recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

The Nevada Supreme Court grounded its decision upon a review of its own jurisdiction. It did not reach the

purported federal question but even if it had, clearly its decision could have been quite properly based on a number of non-federal grounds. This Court should therefore decline review. *Williams* v. *Oliver*, 53 U.S. 111 (1851); *De Saussure* v. *Gaillard*, 127 U.S. 216 (1888); *Stembridge* v. *State of Georgia*, 343 U.S. 541 (1952).

II

Petitioner Doe Failed to Meet Prerequisites for Declaratory Relief

In cases of actual controversies involving actual, immediate disputes as opposed to abstract, hypothetical or academic questions, a judicial determination of rights and liabilities may be declared under the Uniform Declaratory Judgment Act, NRS Chapter 30. John Doe proceeded under this chapter but failed to meet the prerequisites for declaratory relief in Nevada.

As to the question of the Nevada Court's jurisdiction to proceed with declaratory relief in the present matter, *Kress* v. *Corey*, 65 Nev. 1, 26, 189 P.2d 352 (1948), sets forth the conditions precedent to an action for declaratory relief in the State of Nevada.

> "The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows:
>
> (1) *there must exist a justiciable controversy*; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the *controversy must be between persons whose interests are adverse*; (3) *the party seeking declaratory relief must have a* legal interest in the

controversy, that is to say, *a legally protectible interest;* and (4) the issue involved in *the controversy must be ripe* for judicial determination." (Emphasis added).

There was no justiciable controversy between the Petitioner and Respondents. The Petitioner alleges in paragraph III of the Amended Complaint (P.B. 17) that Respondents were enforcing or threatening to enforce the statutes and ordinances complained of against the Petitioner. If Respondents were presently enforcing the statutes in question against Petitioner then his remedy was at law in the criminal prosecution. Petitioner, however, merely feared prosecution. The case then was not ripe for judicial review.

This Court has held that even where plaintiffs alleged that the District Attorney intended to enforce the statute complained of, and where plaintiffs' intended conduct would be in violation, that a justiciable controversy required a threat of *imminent enforcement,* and therefore the controversy was not ripe for decision and this court lacked jurisdiction to proceed. *Poe* v. *Ullman,* 367 U.S. 497 (1961); *Laird* v. *Tatum,* 408 U.S. 1 (1972).

This Court has also held that the conflict between freedom of the individual and the requirements of the public order should not be adjudicated, "except when definite rights appear upon the one side and definite prejudicial interferences on the other" indicating that the complaint was insufficient with respect to the specificity of both plaintiffs' proposed conduct and the state's threat of enforcement. *United Public Workers of America* v. *Mitchell,* 330 U.S. 75 (1947); also discussed in *Threat of Enforcement—Prerequisite of a Justiciable Controversy,* 62 Columbia Law Review, 106, at 121.

This is aside from the issue that Petitioner herein had no standing to bring an action for declaratory relief under a pseudonym. In an action for declaratory judgment the Plaintiff must have a legally protectible interest in the controversy, *Wells* v. *Bank of Nevada,* 90 Nev. 172, 522 P.2d 1014 (1974). Although Doe plaintiff actions are of first impression in Nevada the Federal courts have refused to allow "John Doe" plaintiffs such standing except under limited circumstances which the Petitioner failed to satisfy.

III

An Action May Not Be Brought or Protected in the Name of a Fictitious Person Unless Certain Conditions Are Met

Under NRCP 10(a), which is identical to FRCP 10(a), a party's name is required to be included in the complaint, to fail to do so is a fatal defect.

The Court's attention is invited to the case of *Roe* v. *New York,* 49 F.R.D. 279 (S.D. N.Y. 1970) based upon FRCP 10(a) where the Court stated:

". . . The Court must be able to identify from the complaint *at least one plaintiff by name*; otherwise, no action has been commenced.

"[2] If an action had been commenced by the filing of this complaint, then amendments could be permitted or protective orders made, on a proper showing, which would shield the identity of plaintiffs from the public while permitting this necessary knowledge *to the Court and to defendants.*" (Emphasis added). *Roe* at 281.

Even in those few jurisdictions where plaintiffs have been allowed to bring an action under a pseudonym, fair-

ness has required that the true identity of the plaintiff be revealed to the Court and defendant.

> "To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide *moot* questions, ... The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public." *Roe, supra,* at 282, citing *Buxton* v. *Ullman,* 147 Conn. 48, 156 A.2d 508, 514 (1959).

The *Roe* Court went on to hold that:

> ". . . Sound public policy would appear to require that a complaint identify by true names at least one plaintiff if the filing is to commence an action; if the complaint fails to identify by true name at least one plaintiff then its filing is not effective to commence an action." *Roe,* at 282.

The rationale for precluding "John Doe" plaintiffs from bringing an action is to assure finality to the action and that res judicata will attach. Exceptions to the rule have involved plaintiffs representing a readily identifiable class, which was clearly defined or where there was at least one known, named plaintiff before the court. These exceptions, however, are in themselves unique. They deal exclusively with highly personal status situations where the right to privacy of the parties demanded its use and where the courts were not required to make crucial factual determinations to reach a decision. Social stigma was central to those cases and their operative facts did not allow for the factual variations present in the instant matter. Additionally, the use of the pseudonym was not made

an issue in those cases. See for example, *Jane Doe* v. *Henry Wade,* 410 U.S. 113 (1973).

The District Court's failure to require Petitioner John Doe to reveal his identity during the course of the proceedings below to either the court or Respondents and its subsequent decision in Petitioner's favor were clearly in error. Not only did the use of a pseudonym deprive the court and Respondents of necessary information but, because of the particular nature of the case, it constituted a fatal defect in the complaint. Therefore, the District Court lacked jurisdiction to proceed on the merits of the case and the Supreme Court of Nevada properly reversed and remanded with direction to dismiss.

IV

Petitioner Doe Failed to Meet the Requirements of NRCP Rule 23(a) for Class Certification

Rule 23(a) of the Nevada Rules of Civil Procedure sets forth the prerequisites of a class action.

Nothing in either of Petitioner Doe's complaints or the record suggests that these prerequisites were satisfied.

The requirement of a numerous class is intended to protect members of a small class from being deprived of their rights without a day in court. *Matthies* v. *Seymour Mfg. Co.,* 270 F.2d 365, *Cert. Denied,* 361 U.S. 962 (1960).

The requirement that a class must be clearly ascertainable with a well-defined community of interest in questions of law and fact is essential to sustain a class action. *Gerhard* v. *Stephens,* 442 P.2d 692, 68 Cal.2d 864 (1968); *City of San Jose* v. *Superior Court of Santa Clara County,* 525 P.2d 701, 115 Cal. Rptr. 797 (1974).

Before a class action can be maintained under NRCP 23(b), it must be shown that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Hirschi* v. *B. and E. Securities,* 41 F.R.D. 64 (D.C. Utah 1966). *Class Actions* (C.A. Wright), 47 F.R.D. 169, 178; 2 *Barron and Holtzoff, Federal Practice and Procedures* (Wright and Elliott Supplement), Section 562.

The facts in the Amended Complaint are sketchy at best:

> "That Plaintiff JOHN DOE is and intends to immediately engage in *substantial* private wagering, to-wit:
>
> "1. Upon *existing pre-arranged* terms and *conditions* between *close personal* friends of the Plaintiff, which are arrived at and arranged within the State of Nevada, Plaintiff and said close personal friends *intend to routinely and frequently* bet or wager on various non-Nevada sporting events in their private homes or dwellings." (Emphasis added). (P.B. 17).

How much is substantial? What are the terms and conditions of the game? Who qualifies as a close personal friend? How often is routine and frequent? The question really is when does gaming become a business and require licensing. The operative facts are crucial to this case and are peculiar to each individual case. The Respondents attempted to resolve these relevant questions but were denied essential discovery.

The Nevada Supreme Court has held that where an examination of the facts pertaining to each member of the class was necessary, leading to the possibility of a

multiplicity of lawsuits, a class action cannot be sustained. *Johnson, et al.* v. *Travelers Insurance Co., et al.,* 89 Nev. 467, 515 P.2d 68.

There has been no showing on the part of Petitioner Doe that his claims were typical of the individual members of the alleged class. Indeed such a showing would be difficult, at best, where the very nature of gaming activity has inherent in it so many variables, infinite extensions, and chameleon-like inconsistencies, and especially where the facts of Petitioner's proposed conduct are in itself, vague, broad and indefinite.

Petitioner made no showing that he was in a position to "protect fairly and adequately" the interests of the members of the alleged class as required by NRCP 23(a).

In the instant case, it is difficult to conceive how the applicability of a penal statute to a group of individuals can be ascertained in a class action where there is no clear definition of fact as to conduct or proposed conduct, no common fund or transaction, nor agreed to community of interest, where the class was not noticed and defined by the trial court.

Beyond the issue of the sufficiency of the John Doe pleading these Respondents were denied relevant discovery of the operative facts of this action.

V

Fifth Amendment Is a Shield and Not a Sword Protecting People Not Aliases

In order to maintain anonymity under this pseudonym, John Doe asserted the right to invoke a Fifth Amendment privilege in the course of civil discovery and the District Court issued a protective order to that effect. In *Indepen-*

dent Productions Corporation v. *Loew's Inc.*, 22 F.R.D. 266 (S.D. N.Y. 1958) a Plaintiff asserted Fifth Amendment privileges in a private treble damage antitrust action. The Court held:

> "*Plain justice dictates* the view that, regardless of plaintiff's intention, *plaintiffs* must be deemed to have waived their assumed privilege by bringing this action . . . they *can not use this asserted privilege as both a sword and a shield . . . .*" *Id.* at 276, 277. (Emphasis supplied).

The sword and shield metaphor was further developed in an opinion by Chief Justice Desmond and six other Justices of the New York Court of Appeals. The refinement was:

> "*The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart* any attempt by defendant at a *pretrial discovery* proceeding to obtain information relevant to the cause of action alleged, and possible defense thereto." *Laverne* v. *Incorp. Village of Laurel Hollow*, 18 N.Y.2d 635, 272 N.Y.S.2d 780, 219 N.E.2d 294 (1966). (Emphasis added).

A similar issue was addressed in *Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969), *Cert. Denied*, 397 U.S. 1027 (1970). See also *Brown* v. *Ames*, 346 F. Supp. 1176 (1972); *Foss* v. *Gerstein*, 38 F.R.D. 627 (1973); *Bramble* v. *Kleindienst*, 357 F. Supp. 1028 (1973) and *Penn Communications Specialties, Inc.* v. *Hess*, 65 F.R.D. 410 (1975).

The Court's attention is also invited to the case of *Doe* v. *Boyle*, 60 F.R.D. 507 (E.D. Va. 1973), *Aff'd* 494 F.2d 1279 (4th Cir. 1974), wherein the Plaintiff was seeking

similar relief sought in the instant matter. In dismissing the Plaintiff's complaint, the court said:

> "The Fifth Amendment protects people not aliases. The standard for application of the Fifth Amendment privilege is whether 'the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.' *Marchetti* v. *United States*, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed. 2d 889 (1968). *While the Court accepts the representation of plaintiff's counsel that plaintiff is indeed confronted by a real hazard of incrimination, said representation could not alone, in view of the personal nature of the Fifth Amendment right carry plaintiff's burden of proof on this issue.* Should the Court proceed in this matter in its present posture, and should plaintiff prevail, numerous persons could appear after judgment claiming to be John Doe. That prospect offends the sacred nature of the Amendment guaranty of personal liberty.
>
> "As Justice Holmes said in a similar context in *United States* v. *Sullivan*, 274 U.S. 259, 264, 47 S.Ct. 607, 608, 71 L.Ed. 1037 (1927), the plaintiff 'could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.' " At 507-508. (Emphasis added).

The result of the District Court's Protective Order was that only the attorneys for Petitioner Doe knew the identity of the Petitioner Only they were privy to facts of the gaming operation at issue other than those disclosed in the complaint and in the answers to interrogatories which were signed and answered by counsel for the Petitioner upon information and belief. Nothing in this record could bind him or the class he purported to represent

to judgment. Similarly, nothing would prevent any number of actions from being brought to establish rights by declaratory judgment as they apply to any hypothetical situation under any criminal statute or ordinance through the use of a fictitious plaintiff.

CONCLUSION

Therefore, Respondents respectfully request that for the foregoing reasons Petitioner's application for a writ of certiorari should be denied for a lack of jurisdiction.

Respectfully submitted,

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APPENDIX

U. S. CONSTITUTION

ARTICLE III

Section 2. Extent of judicial power; criminal trials; venue. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

NEVADA CONSTITUTION

ARTICLE 6

Section 4. Jurisdiction of supreme court; appointment of district judge to sit for disqualified justice. The supreme court shall have appellate jurisdiction in all cases in equity; also in all cases at law in which is involved the title, or the right of possession to, or the possession of, real estate or mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand (exclusive of interest) or the value of the property in controversy, exceeds three hundred dollars; also in all other civil cases not included in the general subdivisions of law and equity, and also on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts. The court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus* and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of *habeas corpus* to any part of the state, upon petition by, or on behalf of, any person held in actual custody, and may make such writs returnable, before himself or the supreme court, or before any district court in the state or before any judge of said courts.

In case of the disability or disqualification, for any cause, of the chief justice or either of the associate justices of the supreme court, or any two of them, the governor is authorized and empowered to designate any district judge or judges to sit in the place or places of such disqualified or disabled justice or justices, and said judge or judges so designated shall receive their actual expense of travel and otherwise while sitting in said supreme court.

* * *

Sec: 6. Jurisdiction of district courts. The District Courts in the several Judicial Districts of this State shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property, or Mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy, exceeds Three Hundred Dollars, also in all cases relating to the estates of deceased persons, and the persons and estates of Minors and insane persons, and of the action of forcible entry and unlawful detainer; and also in all criminal cases not otherwise provided for by law; They shall also have final appellate jurisdiction in cases arising in Justices Courts, and such other inferior tribunals as may be established by law. The District Courts, and the Judges thereof shall have power to issue writs of Mandamus, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction; and also shall have power to issue writs of Habeas Corpus on petition by, or on behalf of any person held in actual custody in their respective districts.

NEVADA RULES OF CIVIL PROCEDURE

RULE 10. FORM OF PLEADING

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of

other parties. A party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly.

RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[As amended; effective September 27, 1971.]

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[As amended; effective September 27, 1971.]